

NO. A11-1081

State of Minnesota
In Supreme Court

1st Fidelity Loan Servicing, LLC,

Appellant,

vs.

Doris Ruiz,

Respondent.

**BRIEF OF MINNESOTA LAND TITLE ASSOCIATION,
THE MINNESOTA BANKERS ASSOCIATION AND
THE MINNESOTA ASSOCIATION OF REALTORS, AS AMICI CURIAE**

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STATEMENT OF INTEREST

Minnesota Land Title Association (“MLTA”), the Minnesota Bankers Association (“MBA”) and the Minnesota Association of Realtors (“MNAR”) (collectively, the “Amicus Parties”) submit this brief as *amicus curiae*, and request reversal of the Minnesota Court of Appeals. The Amicus Parties’ interests in this action are public.

MLTA was formed in 1908 as a professional organization for the integrity of Minnesota land titles. With members throughout the state, MLTA is Minnesota’s largest land title association. MLTA members provide abstracts of title, real estate closing services, title insurance, and related services to the real estate and lending industries, on behalf of the public. MLTA’s membership includes title insurance agents, title insurance underwriters, abstractors, settlement agents and real estate attorneys.

MBA has served Minnesota’s banking community since 1889, providing its members with the leadership, services, and support necessary to ensure a vital, growing financial industry. MBA members include commercial banks, trust companies, and savings associations with offices in Minnesota.

MNAR was formed in 1919 as a business trade organization and focuses on governmental affairs, regulatory activities, professional standards, and risk reduction to ensure a vibrant atmosphere for the purchase and sale of real estate in Minnesota. MNAR is comprised of nearly 20,000 real estate agents and brokers.

The Amicus Parties’ members have firsthand knowledge of the public consequences of the holding in *Ruiz*. The Amicus Parties offer insight into the public

benefits of this Court reaffirming its holding that foreclosure defects are voidable, but not void as a matter of law.

The Amicus Parties join the Statement of the Case and the Statement of Facts in Appellant's brief.

STATEMENT OF THE ISSUE

DID THE COURT OF APPEALS ERR BY HOLDING ANY STATUTORY VIOLATION VOIDS A FORECLOSURE BY ADVERTISEMENT?

SUMMARY OF DISCUSSION

The Minnesota Supreme Court has historically favored a substantial compliance standard for most foreclosure by advertisement defects, and has held that defects in the foreclosure requirements make a foreclosure voidable, but not void. The Court of Appeals misapplied Minnesota law and articulated a strict compliance standard for any violation of the foreclosure by advertisement statutes. This Court should affirm longstanding precedent that a defect in a foreclosure by advertisement only invalidates the foreclosure when the violated statute is calculated to protect the interests of the party challenging the foreclosure and the defect actually prejudices the party challenging the foreclosure.

DISCUSSION

The Court of Appeals held that "...Minnesota Supreme Court precedent requires strict compliance with statutory requirement in a foreclosure by advertisement...." *Ruiz v. 1st Fidelity Loan Servicing, LLC*, 2012 WL 762313, *1 (Minn. Ct. App. 2012). The Court of Appeals held that the foreclosure by advertisement was "void" for failure to

strictly comply with Minnesota Statutes sections 580.02 and 580.032. *Id.* at *5. The Court of Appeals relied on *Moore v. Carlson*, 112 Minn. 433, 128 N.W. 578 (1910) and *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009). Specifically, the Court of Appeals relied heavily on the following dicta in *Jackson*:

Foreclosure by advertisement was developed as a non-judicial form of foreclosure designed to avoid the delay and expense of judicial proceedings. Because foreclosure by advertisement is a purely statutory creation, the statutes are *strictly construed*. We require a foreclosing party to show *exact* compliance with the terms of the statutes. If the foreclosing party fails to strictly comply with the statutory requirements, the foreclosure proceeding is void.

Jackson, 770 N.W.2d at 494 (emphasis in original).

This comment is dicta because the issue in *Jackson* was whether an assignment of the underlying indebtedness must be recorded for a mortgage held by a nominee to be foreclosed by advertisement. *Jackson* at 493. The *Jackson* Court held there was no statutory requirement that transfers of the underlying indebtedness be recorded to foreclose a mortgage by advertisement. *Id.* at 489-90. Thus, there was no statutory foreclosure defect in *Jackson* and the Court did not address whether a defect rendered the foreclosure void or voidable.

The *Ruiz* Court of Appeals cited *Hudson v. Upper Michigan Land Co.*, 165 Minn. 172, 206 N.W. 44 (1925) and acknowledged that defects in foreclosure proceedings render the foreclosure voidable, but not void. However, the Court of Appeals stated that *Hudson* did not provide a basis to reject the “much more recent reiteration of the strict compliance standard” set forth in *Jackson*. *Ruiz* at *3. The Court of Appeals apparently

believed it was bound by the dicta in *Jackson. Ruiz* at *4. Because the dicta contained in *Jackson* did not reflect historical precedent regarding foreclosure by advertisement defects, the decision of the Court of Appeals should be overruled.

This Court has issued dozens of decisions on the consequences of defects in the foreclosure by advertisement process. These cases do not use a consistent analytical framework and the language used to analyze foreclosure defects is inconsistent. Some decisions call for strict compliance and some decisions call for substantial compliance. A few decisions indicate that a violation of a foreclosure statute make the foreclosure void, while most others hold that a defect in the foreclosure proceedings makes the foreclosure voidable, but not void.

While the decisions inconsistently analyze technical defects, there are common themes that run through most of the cases. First, a select few foreclosure by advertisement provisions are essential and a clear departure from those requirements will invalidate a foreclosure. There must only be substantial compliance with the remaining non-essential foreclosure provisions. Second, the Court must look at the purpose of the violated statute and determine whether the statute protects the interests of the person challenging the foreclosure. Third, the Court must look at whether the person challenging the foreclosure has been prejudiced by the statutory violation.

The Amicus Parties urge the Court to adopt a clear standard that a defect in a foreclosure by advertisement statute makes the foreclosure voidable rather than void, that a defective foreclosure will only be voided if the violated statute protects the interest of

the person challenging the foreclosure, and that person was actually prejudiced by the defect.

I. Foreclosure defects that render foreclosure Voidable.

Despite the strict-compliance dicta in *Jackson*, the Minnesota Supreme Court has a long history of analyzing defects in foreclosure by advertisement statutes under a more flexible standard. These decisions are clear that a defect on a foreclosure by advertisement statute does not automatically void the foreclosure.

As early as 1854, the territorial Supreme Court held that a violation of the statute did not void the foreclosure. In *Tillman v. Jackson*, 1 Minn. 183 (1854), the Court reversed a holding a foreclosure sale was void when distinct lots were sold together in violation of the statute that required each lot to be sold separately (now codified as Minnesota Statutes section 580.08). *Tillman* at 186-87. The *Tillman* Court held that the statutory provision was “only directory.” *Id.* at 187.

In 1872, this Court upheld a foreclosure in which the amount due stated in the notice of sale was erroneously high, when no fraud or injury to the complaining party was shown. See *Butterfield v. Farnham*, 19 Minn. 85, 90 (1872). In 1874, this Court held failing to state a time in the notice of sale was “at most, an irregularity” that was not cause to overthrow the sale. See *Menard v. Crowe*, 20 Minn. 448, 20 Gil. 402, 405 (1874).

In 1877, this Court reaffirmed *Tillman* and stated that “a sale in gross of separate tracts does not render the sale void” had become a “rule of property” and the court would not depart from the rule. *Lamberton v. Merchants’ Nat. Bank of Winona*, 24 Minn. 281,

288 (1877). The *Lamberton* Court noted that if the sale in gross was the result of “actual fraud” or if the complaining party showed prejudice by the mode of the sale, the courts could relieve the complaining party from the sale. *Id.* Thus, it has long been the law in Minnesota that foreclosure defects render the foreclosure voidable, not void. “In other words, that while the sale is not void, it may be avoided upon cause shown.” *Id.*

Five years after *Lamberton*, this Court reviewed the statutory requirement to serve notice on the person in possession of the mortgaged premises, if actually occupied (now codified as Minnesota Statute section 580.03). See *Holmes v. Crummett*, 30 Minn. 23, 24 13 N.W. 924, 924 (1882). The *Holmes* Court expanded on the “*Tillman* Rule” and analyzed whether the statute was for the benefit of the complaining party. *Id.* at 25. The *Holmes* Court stated:

It is a general principle that compliance with the prescribed statutory requirements is necessary to make a valid statutory foreclosure [sic]; and the statute must undoubtedly be observed as to all steps in the proceeding which are calculated to protect the interests of the party whose rights are in question; and the omission of any required act which the court can see, or from its nature will presume, prejudiced the rights of parties thus sought to be foreclosed, will render ineffectual the attempted foreclosure. But the court will regard the object sought to be accomplished by the statutory requirements, and it is not enough to warrant the granting of relief, to one seeking to have a foreclosure set aside, or adjudged ineffectual as to him, that there has been an omission of some prescribed act which cannot have affected him, and cannot have been prescribed for his benefit.

Holmes v. Crummett, 30 Minn. at 25, 13 N.W. at 924.

In *Holmes*, the mortgagor did not reside on the mortgaged premises. The foreclosing lender served the mortgagor with notice of the foreclosure, but it did not serve the tenant who resided on the land, in violation of the statute. *Id.* at 24. However,

because the statutory requirement of serving the person in possession was for the benefit of the mortgagor, the mortgagor had no reason to complain and the foreclosure was upheld. *Id.* at 25.

In *Martin v. Baldwin*, 30 Minn. 537, 539, 16 N.W. 449, 449-50 (1883) the Court invalidated a foreclosure because the notice of sale failed to state when the mortgage was recorded. However, in holding that the foreclosure was invalid, the Court stated, “In foreclosing under the power of sale, what the statute requires must be substantially complied with.” The Court analyzed the purpose of the statute and concluded that it was for the benefit of anyone with an interest in the property. *See id.*

Also in 1883, the Court differentiated between “essential” requirements from non-essential irregularities. *See Bottineau v. Aetna Life Ins. Co.*, 31 Minn. 125, 16 N.W. 849 (1883). The *Bottineau* Court stated, “Mere irregularities in judicial sales, or sales under powers, (unless the statute provides that they shall render the sales void,) do not affect their validity, unless they may operate to prejudice some party interested.” *Bottineau*, 31 Minn. at 128, 16 N.W. at 850. However, “essential requisites of the notice” cause the foreclosure to be “utterly null.” *Bottineau*, 31 Minn. at 126, 16 N.W. at 849. The essential requirement violated in *Bottineau* was that the designated place of the sale did not exist. *Id.*

Justice Mitchell repeated the “substantial compliance” test in *Mason v. Goodnow*, 41 Minn. 9, 11, 42 N.W. 482, 483 (1889) (“...what the statute requires must be substantially complied with.”). In *Mason*, the Court invalidated a foreclosure because the notice of sale did not state the amount due on each lot (currently codified as Minnesota

Statutes section 580.04(a)(3)). *Id.* at 10. The *Mason* Court concluded that the statute was for the benefit anyone with an interest in the property and that failing to state the amount due “defeat the very purpose” of the statute. *Id.*

In a subsequent opinion, Justice Mitchell acknowledged conflict between authorities on whether a sale contrary to the statute, renders the foreclosure void or voidable. *See Willard v. Finnegan*, 42 Minn. 476, 478, 44 N.W. 985, 985-86 (1890). *Willard* reiterated the substantial compliance test in evaluating the failure to comply with the statutory require of separate sales for separate tracts. The *Willard* Court unequivocally upheld and reaffirmed the central holdings of *Tillman* and *Lamberton*. *Id.* When deciding between whether a foreclosure defect makes a foreclosure void or voidable, the *Willard* Court held that the “better rule” is to hold violations of the foreclosure statutes to be voidable, not void, and that fraud, prejudice, or other good cause must be shown. *Id.* at 478-79. The *Willard* Court reasoned, “The consequences of a contrary rule would be disastrous. A great many titles would be open to question and doubt.” That is the same consequence of the *Ruiz* decision by the Court of Appeals.

In 1891, the Court invalidated a foreclosure because the notice of sale stated an incorrect time of the sale. *See Richards v. Finnegan*, 45 Minn. 208, 209, 47 N.W. 788, 788-89 (1891). However, the *Richards* Court stated the requirement of the statute must be “substantially complied with” and analyzed prejudice by stating that if a sale takes place before the stated time in the notice, the notice would be “misleading.” *Id.* at 208-09. In *Clark v. Kraker*, 51 Minn. 444, 53 N.W. 706 (1892), the Court reaffirmed the rule that

a sale in gross of separate tracts does not render the foreclosure void, but merely voidable where prejudice is shown. *Id.* 51 Minn. at 448, 53 N.W. at 707-08.

In *Swain v. Lynd*, 74 Minn. 72, 75-76 76 N.W. 958, 959 (1898), and in *Cutting v. Patterson*, 82 Minn. 375, 380, 85 N.W. 172, 173 (1901), the Court held statutory requirements must be substantially complied with, and that when the notice of sale is not served on the mortgagor or on the occupants, the foreclosure may be invalidated if the person challenging the foreclosure has not waived the argument. In reaching this conclusion, *Swain* and *Cutting* Courts found that service of the notice of sale on the occupants is for the benefit of both the occupants and the mortgagor.

The Court specifically analyzed whether a violation of a foreclosure statute rendered the foreclosure void or voidable in *Hudson v. Upper Michigan Land Co.*, 165 Minn. 172, 206 N.W. 44 (1925). In *Hudson*, the Court reviewed the statutory requirement that the sheriff's certificate of sale be recorded within 20 days after the sale (now codified as Minnesota Statutes section 580.12). *Id.*, 165 Minn. at 174, 206 N.W. at 45. The *Hudson* Court analyzed the purpose of the statute and found the statute was for the protection of those with redemption rights. *Id.*, 165 Minn. at 175, 206 N.W. at 46. Finally, the Court analyzed whether the party challenging the foreclosure was prejudiced by the defect. *Id.*, 165 Minn. at 176, 206 N.W. at 46. Because the challenging party was a junior creditor with redemption rights, the Court concluded the challenging party had been prejudiced by the defect and invalidated the foreclosure. *Id.* In making its conclusion, the Court articulated a rule to analyze whether a statutory violation invalidates a foreclosure as:

The case is one for the application of the general rule that a foreclosure by virtue of a power of sale is not valid, unless there has been an observance of all statutory requirements calculated to protect the interests of the party whose rights are affected; that the omission of any required act prejudicial to a party in interest will render the attempted foreclosure ineffectual; and that, although mere irregularities do not avoid the sale unless the statute so provides, nevertheless it may be avoided if the irregularities operate to prejudice the rights of a party in interest. (citing *Holmes v. Crummett*, 30 Minn. 23, 13 N. W. 924; *Bottineau v. Aetna Life Ins. Co.*, 31 Minn. 125, 16 N. W. 849.)

Id., 165 Minn. at 176-77, 206 N.W. at 46.

In other words, the rule promulgated by the *Hudson* Court requires review of the purpose of the violated statute and whether the statute protects the party challenging the foreclosure. Next, the court must determine whether the person challenging the foreclosure has been prejudiced by the error. The Amicus Parties suggest that this rule, in conjunction with Minnesota's curative act discussed below, should govern this case.

This Court and other courts have followed *Holmes* and *Hudson* since 1925. In *Skartum v. Koch*, 174 Minn. 47, 218 N.W. 446 (1928), the Court cited to *Holmes* and held that a defect that did not affect or prejudice the challenging party is not sufficient to invalidate the foreclosure. *Id.*, 174 Minn. at 48, 218 N.W. at 446 (failure to serve occupants of a hunting shack did not invalidate a foreclosure where the lessee of the entire farm had notice of the sale). The United States District Court for Minnesota, applying Minnesota law, held that a sale in gross of separate tracts does not render the sale void, but voidable where the challenging party has not waived the claim and has been prejudiced. See *John W. Swenson & Sons, Inc. v. Aetna Life Ins. Co.*, 571 F. Supp. 895 (D. Minn. 1983). Moreover, that same court declined to follow the *Ruiz* Court and

held that failure to comply with Minnesota Statutes section 580.032 does not void the foreclosure sale. *See Badrawi v. Wells Fargo Home Mortg., Inc.*, 2012 WL 2178966 (D. Minn. 2012). The *Badrawi* Court was not persuaded by *Ruiz*, and instead cited *Holmes v. Crummett*, finding that section 580.032 does not benefit the mortgagor and the mortgagor cannot void a foreclosure based on non-compliance of that statute. *Id.* at * 5, ft. 2.

II. Foreclosure defects that render a foreclosure void.

Some Minnesota Supreme Court decisions set forth a “strict compliance” standard. However, a close reading of those decisions demonstrates that, despite the strict compliance language used, the Courts generally nevertheless analyzed the purpose of the statute, whether the statute protects the party challenging the foreclosure, and whether the complaining party was prejudiced.

In *Spencer v. Annon*, 4 Minn. 542, 544 (1860), the Court used language suggesting a strict compliance standard for a defect in the foreclosure proceeding. (“When the holder of a mortgage ... resorts to the power contained in the mortgage, thus taking the remedy in his own hands, by an *ex parte* proceeding, it is but reasonable that he should be kept strictly within the terms of the power, and held to a rigid observance of all the requirements of the Statutes which regulate its exercise....”) In *Spencer*, the amount due in the notice of sale was arbitrary and had no basis in the contract or calculation. *Id.* at 544-45. Despite this strict-compliance language, the Court went on to analyze whether the complaining party was prejudiced by the defect and specifically states that if the party “is not shown to be prejudiced thereby, the sale should not be disturbed.” *Id.* at 544. One year later, this Court upheld a foreclosure in which the amount stated in the notice

was incorrect because there was no prejudice to the complaining party. *See Ramsey v. Merriam*, 6 Minn. 168, 173 (1861). Twelve years later, the Court cited *Spencer* in holding that “...in the absence of fraud in law, fraud in fact, or actual injury, the claiming of more than is either actually legally due, or stipulated for in the contract, cannot affect the validity of the sale.” *Butterfield v. Farnham*, 19 Minn. 85, 90 (1872). Moreover, in 1976, the Legislature passed Minnesota Statutes section 582.25 (the “Curative Act”), which is a statute of repose that cures foreclosures against certain defects one year from the date of the sheriff’s sale (except the failure to record a power of attorney requires ten years to cure). Section 582.25(3)(f) specifically validates foreclosures where the notice of sale did not state the amount due or stated an incorrect amount due. Thus, after the passage of the Curative Act, any defect in the amount due in the notice of sale makes the foreclosure voidable, and not void.

When an assignment of mortgage is not recorded, the foreclosure is invalid. *See Morrison v. Mendenhall*, 18 Minn. 232, 236 (1872) (holding that unrecorded assignment of mortgage invalidated sale), *Lowry v. Mayo*, 41 Minn. 388, 390, 43 N.W. 78, 78 (1889) (assignment of mortgage that was not duly acknowledged invalidated foreclosure sale), *Backus v. Burke*, 48 Minn. 260, 269, 51 N.W. 284, 286 (1892). The *Morrison* Court discussed the purpose of the statute that requires mortgage assignments to be recorded and noted that it was for the benefit of the parties of the mortgage, subsequent encumbrancers, and contemplating purchasers. *See Morrison*, 18 Minn. at 236. However, *Morrison* and *Backus* involve mortgage assignments that were not properly recorded. They do not involve a situation where the mortgage assignment was *untimely*

recorded. Under Curative Act, an untimely recorded mortgage assignment is validated one year after the sale if the assignment is recorded in time for the notice to published at least three times. (Minn. Stat. § 582.25(3)(a)). Now this type of defect clearly makes a foreclosure voidable, not void.

This Court held the provision that requires the notice of sale to state the date of the mortgage to be mandatory, rather than directory (now codified as Minnesota Statutes section 580.04(a)(2)). *See Clifford v. Tomlinson*, 62 Minn. 195, 198, 64 N.W. 381, 382 (1895). The *Clifford* Court acknowledged the line of substantial compliance authority, and analyzed the purpose of the statute and whether the complaining party was prejudiced by the defect. *See id.* The *Clifford* Court concluded that the statute requiring the date of the mortgage to be in the notice of sale is mandatory and failure to properly assert the date might deter potential bidders at the sale, which would prejudice the mortgagor who could be responsible for a deficiency. *See id.* (That analysis is no longer authoritative, since the adoption of the anti-deficiency statute, section 582.30, which effectively prohibits deficiencies in nearly all foreclosures by advertisement.) Failing to properly list the date of the mortgage in the notice of sale is now fixed by the Curative Act. (Minn. Stat. § 582.25(3)(11)). Thus, despite *Clifford*, this type of defect now makes the foreclosure voidable, not void.

In 1898, the Court again held that recording an assignment of the mortgage is an essential requirement of a foreclosure and that failure to record an assignment of mortgage invalidates the foreclosure. *See Hathorn v. Butler*, 73 Minn. 15, 20, 75 N.W. 743, 744 (1898). However, in *Hathorn*, the defect did not void the foreclosure as a

matter of law, because the Court held open the possibility that the defect might not invalidate the foreclosure if a third party purchased at the foreclosure sale or if a junior creditor redeemed from the foreclosure sale without knowledge of the unrecorded assignment. *Id.* Moreover, *Hathorn* did not deal with an *untimely* recorded assignment of mortgage.

In *Peaslee v. Ridgway*, the Court stated that whether the defects are of a prejudicial character “is not considered important.” 82 Minn. 288, 290, 84 N.W. 1024, 1024 (1901) (when the mortgage recording information in the notice of sale was incorrect, the foreclosure is invalid). Despite holding that prejudice is not important, the *Peaslee* Court went on to favorably cite *Clifford*, *Mason*, *Richards*, and *Backus*, all of which analyzed the purpose of the statute and whether the error was prejudicial. In fact, the *Peaslee* Court declined to invalidate the sale based on a misstatement in the power of attorney and reasoned that “[a]n informal defect of the nature of that shown in this case is not fatal to its validity or sufficiency.” *Peaslee*, 82 Minn. at 290. Despite its strict compliance language, the *Peaslee* Court discussed the objective of the violated statute and concluded the statute was for the benefit of anyone with an interest in the property and potential bidders. *Id.* at 291. The defect in *Peaslee* was incorrect recording information for mortgage in the notice of sale. *Id.* at 289. This type of defect is now fixed by the Curative Act, making the foreclosure voidable, not void. (Minn. Stat. § 582.25(11))

The *Ruiz* Court cited *Moore v. Carlson*, 112 Minn. 433, 128 N.W. 578 (1910) for its strict compliance standard. In *Moore*, the foreclosing lender failed to reference the

mortgage assignments in the notice of sale in violation of statute (now codified as Minnesota Statutes section 580.04(a)(1)). *Id.* at 434. The *Moore* Court, without citing or overruling cases that hold foreclosure defects are voidable, held that failure to comply with the statute void the foreclosure. *Id.* However, the *Moore* court did discuss the purpose of the statute. *Id.* (finding that the name of the assignees in the notice of sale has value to the mortgagor.) More importantly, the *Moore* Court did not have the final word, and the Court subsequently reaffirmed its substantial compliance holding in *Hudson v. Upper Michigan Land Co.*, 165 Minn. 172, 206 N.W. 44 (1925). Finally, the defect that rendered the foreclosure “void” in *Moore* is now fixed under the Curative Act, making a defective foreclosure voidable, not void, and legislatively overruling *Moore*. (Minn. Stat. § 582.25(11))

In 1924, the Court in *Soufal v. Griffith*, 159 Minn. 252, 198 N.W. 807 (1924) held that an assignment of mortgage appearing of record was a “condition precedent” to foreclose the mortgage. The Court reasoned that the record must be sufficiently complete to show the right of the mortgagee or assigns to invoke the foreclosure by advertisement statutes. *Id.*, 159 Minn. at 256, 198 N.W. at 809. However, *Soufal* did not involve an *untimely* recorded assignment of mortgage, which is capable of being validated under the Curative Act. (Minn. Stat. § 582.25(11))

In 1925, the Court held that the pendency of an action to recover the debt secured by the mortgage suspends the right to proceed to foreclose by advertisement. *See Adlinger v. Close*, 161 Minn. 404, 405, 201 N.W. 625, 625 (1925). The Court found the requirement prohibiting a pending action to recover the debt secured by the mortgage to

be an “essential requisite” for foreclosure by advertisement and the right to proceed must exist from the time of the first publication of the sale. *Id.* This defect is now fixed by the Curative Act. (Minn. Stat. § 582.25(17))

In 1930, this Court held that failure to record the power of attorney foreclosing the mortgage by the time of the sheriff’s sale invalidated the foreclosure. *See Sheasgreen Holding Co. v. Dworsky*, 181 Minn. 79, 80, 231 N.W. 395, 395-96 (1930). The *Dworsky* Court analyzed laches, estoppel, and unjust enrichment, but did not analyze the purpose of the statute or whether the challenging party was prejudice by a violation of the statute. However, failing to record the power of attorney prior to the sheriff’s sale is now fixed by the Curative Act (Minn. Stat. § 582.25(1)(d)).

While these lines of cases use strict compliance language, most of them analyze the purpose of the violated provision and whether the provision was for the benefit of the party challenging the foreclosure. Most cases analyze whether the party challenging the foreclosure was prejudiced. In invalidating the foreclosure, most cases held that the violated provision was an essential requirement to foreclose by advertisement. Finally, (except in cases where the assignment of mortgage was never recorded), the defects that invalidated the foreclosures are now subject to the Curative Act. Thus, any language in these cases that holds or suggests that a defect renders the foreclosure void, rather than voidable, is no longer good law.

III. The Curative Act.

Minnesota Statutes section 580.20 states as follows:

No such sale shall be held invalid or be set aside by reason of any defect in the notice thereof, or in the publication or service of such notice, or in the proceedings of the officer making the sale, unless the action in which the validity of such sale is called in question be commenced, or the defense alleging its invalidity be interposed, with reasonable diligence, and not later than five years after the date of such sale; provided that persons under disability to sue when such sale was made by reason of being minors, insane persons, persons developmentally disabled, or persons in captivity or in any country with which the United States is at war, may commence such action or interpose such defense at any time within five years after the removal of such disability.

Minnesota Statutes section 582.25 (the “Curative Act”) states, in part:

Every mortgage foreclosure sale by advertisement in this state under power of sale contained in any mortgage duly executed and recorded in the office of the county recorder or registered with the registrar of titles of the proper county of this state, together with the record of such foreclosure sale, is, after expiration of the period specified in section 582.27, hereby legalized and made valid and effective to all intents and purposes, as against any or all of the following objections:

The Curative Acts lists 22 specific defects that are legalized and made valid and effective due to the passage of time.

Section 580.20, enacted in 1883, is a general statute of limitations barring pursuit of any remedy based on defects in the foreclosure relating to notice of sale or publication of the notice of sale after 5 years from the sale. *Gallaher v. Titler*, 812 N.W.2d 897, 903 (Minn. Ct. App. 2012). The Curative Act, enacted in 1976, is a statute of repose that validates a foreclosure against certain defects after one year from the date of the sheriff’s sale (except the failure to record a power of attorney requires ten years). *Id.* If a defect does not fit within the enumerated list of defects in the Curative Act, then the five-year statute of limitations in section 580.20 applies. *Id.*

Section 580.20 and the Curative Act show legislative intent that defects in a foreclosure by advertisement make the foreclosure voidable, not void. If a foreclosure is void, it is a nullity, and would not be capable of being cured under the Curative Act. Moreover, the legislature provided for a statute of limitations on *any* defect in the notice of sale or publication. The statute of limitations would be meaningless if certain defects made a foreclosure void. A defect must be timely challenged to invalidate the sale, or the claim is lost and the foreclosure is valid. Even defects relating to essential purposes of the statute must be challenged to be declared invalid; and therefore, cannot be void as a matter of law. Finally, the Curative Act represents a clear legislative public policy in favor of marketability of title. Any case prior to 1976 that relies on a strict compliance standard or states that a foreclosure defect renders a foreclosure void must be viewed skeptically in light of the Curative Act.

IV. *Hudson v. Upper Michigan Land Co.* provides the best articulated rule.

The language used by the Courts analyzing defects in foreclosure proceedings reveals two strains of case law –substantial compliance and strict-compliance. However, the strains can be harmonized. The Amicus Parties submit that the best reasoned and articulated rule for analyzing foreclosure defects was set forth by this Court in *Hudson v. Upper Michigan Land Co.*, 165 Minn. 172, 206 N.W. 44 (1925), when the Court stated:

The case is one for the application of the general rule that a foreclosure by virtue of a power of sale is not valid, unless there has been an observance of all statutory requirements calculated to protect the interests of the party whose rights are affected; that the omission of any required act prejudicial to a party in interest will render the attempted foreclosure ineffectual; and that, although mere irregularities do not avoid the sale unless the statute so provides, nevertheless it may be avoided if the irregularities operate to

prejudice the rights of a party in interest. (citing *Holmes v. Crummett*, 30 Minn. 23, 13 N. W. 924; *Bottineau v. Aetna Life Ins. Co.*, 31 Minn. 125, 16 N. W. 849.)

The rule set forth in *Hudson* (the “*Hudson Test*”), when applied after a challenge to a foreclosure within the time restraints of Section 580.20 and the Curative Act, is workable and gives meaning to most of the Supreme Court decisions. The *Hudson Test* recognizes that a “clear departure” from the essential requirements of the statute – i.e. requirements that benefit anyone with an interest in the property – will vitiate the proceeding (if the foreclosure is timely challenged). *Id.* at 174. However, the *Hudson Test* also recognizes not all statutory requirements are essential and failures to comply with those statutes will not invalidate a foreclosure unless the statute protects the interests of the party challenging the foreclosure and the defect actually prejudices the rights of that party. *Id.* at 176-77.

V. Application of the *Hudson Test* to *Ruiz*.

A. Minnesota Statutes section 580.032, Subd. 3

Application of the *Hudson Test* shows the Court of Appeals erred in invalidating the foreclosure based on lack of recording of the notice of pendency before first date of publication, in violation of Minnesota Statutes section 580.032, subdivision 3.

As a preliminary matter, this type of defect is fixed under the Curative Act. (Minn. Stat. § 582.25(22)) The Curative Act does not prevent Respondent from challenging this foreclosure because the Respondent brought the action within one year of the sheriff’s sale. However, the Curative Act shows that the *Ruiz* Court clearly erred

as a matter of law in holding that failure to record the notice of pendency prior to the first publication renders the foreclosure void, rather than voidable.

Moreover, Section 580.032 is not for the benefit of the mortgagor. Section 580.032 is the “Request for Notice” statute. Subdivision 3 demonstrates that statute protects persons having redeemable junior interests and provides a mechanism for those persons to obtain notice of the foreclosure of a senior mortgage. The purpose of recording the notice of pendency is in subdivision 4, which states that the foreclosing party need not serve notice of the foreclosure on a person who recorded a request for notice if the request was recorded after the notice of pendency. The stated purpose of the requirement to record the notice of pendency is to cut off the foreclosing lender’s obligation to mail serve anyone who records a request for notice after the notice of pendency is recorded. There is no evidence in this case that Respondent recorded a request for notice. Instead, Respondent received direct notice of the foreclosure as mortgagor and occupant of the property. Therefore, section 580.032, subdivision 3 does not protect Respondent’s interest and Respondent could not have been prejudiced by the failure of the Appellant to record the notice of pendency prior to the first date of publication. *See Badrawi v. Wells Fargo Home Mortg., Inc.*, 2012 WL 2178966, * 5 (D. Minn. 2012).

B. Minnesota Statutes section 580.02(3)

Applying the *Hudson* Test to the alleged violation of Minnesota Statutes section 580.02(3) is less obvious. It is relatively clear from the case law that recording assignments of the mortgage is an essential requirement and failure to comply with this

requirement may invalidate the foreclosure sale (unless there is a third party purchaser or a subsequent good faith purchaser takes title to the property prior to the challenge). *See Hathorn v. Butler*, 73 Minn. 15, 20, 75 N.W. 743, 744 (1898), *Soufal v. Griffith*, 159 Minn. 252, 198 N.W. 807 (1924). However, these cases address assignments of mortgages that were not properly recorded. They do not address *untimely* recorded assignments of mortgage. This distinction is important because while failing to record an assignment of mortgage is not fixed by the Curative Act, untimely recorded assignments of mortgage are cured. (Minn. Stat. § 582.25(3)(a)) This means that an untimely assignment of mortgage capable of being cured under the Curative Act renders the foreclosure avoidable, but not void.

In this case, the assignment was recorded before the first publication with an incomplete assignee name, and the corrective assignment with the complete assignee name was recorded on day of first publication. The notice of sale was published validly five times *after* the corrective assignment of mortgage was recorded. Thus, the defect may be cured under Curative Act (Minn. Stat. § 582.25(3)(a)), which validates foreclosures with at least three weeks of valid publication. The Court must analyze the purpose of the recording requirement and whether the Respondent was prejudiced by the date of recording of the assignment of mortgage. Even if the recording requirement benefits of the mortgagor, the omission of the complete legal name of the assignee prior to the first publication could not prejudice the Respondent, and the Respondent was not prejudiced by publication of the notice five times rather than six after the corrective assignment of mortgage was recorded.

The purpose of the requirement is that title of an assignee appear of record. *Soufal v. Griffith*, 159 Minn. 252, 255-56, 198 N.W. 807, 808-09 (1924). “This is not a requirement of supertechnical niceties and details of description.” *Id.* The first assignment identified the assignee as “1st Fidelity.” The second assignment identified the assignee as “1st Fidelity Loan Servicing, LLC.” Holding that an assignment to “1st Fidelity” is insufficient would be requiring “supertechnical niceties and details of description” which this Court has said is unnecessary. Such a trivial distinction is not a “clear departure” of an essential element that “vitiates the proceeding.” *Hudson*, 165 Minn. at 174. Lack of prejudice is particularly evident here since the notice of sale was published five times after a corrective assignment of mortgage was recorded.

VI. The Practical Consequences of the *Ruiz* holding.

The Amicus Parties are in a unique position to assess the negative impact the real estate industry from *Ruiz* holding. The sweeping language of the *Ruiz* Court’s strict compliance standard, and the holding that any defect in a foreclosure by advertisement voids the foreclosure, caught the attention of Minnesota’s real estate industry. The most glaring problem with *Ruiz* is holding that *any* failure to comply with *any* foreclosure by advertisement statute will automatically *void* the foreclosure. This holding causes uncertainty for countless titles throughout Minnesota. *Ruiz* not only opens challenges by mortgagors regarding statutory provisions not designed to protect the mortgagors’ interests, it also opens challenges by non-mortgagors with an interest in the property (junior creditors, redemption speculators, etc.) regarding statutes designed to protect the mortgagors. Moreover, if a foreclosure is void, it is incapable of being cured, even by the

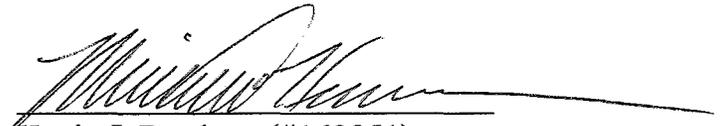
passage of time set forth in the Curative Act. Given the strong language used by the *Ruiz* decision (and in the *Jackson* dicta) that technically defective foreclosures are void, a subsequent good faith purchaser may not be entitled to the protection provided by Minnesota's recording act, codified as Minnesota Statutes section 507.34: If a foreclosure is void, it is nullity, and there is no title to pass to the good faith purchaser. That result has the potential to eliminate the marketability of all titles acquired through foreclosure by advertisement. It will not be acceptable to buyers, sellers, lenders, and title companies to leave open uncertain titles indefinitely. If the *Ruiz* opinion stands, titles after foreclosure by advertisement are at a tremendous risk of being unmarketable. Given the record levels of foreclosures over the past several years, unmarketable title through foreclosure has the potential to depress the recovery of the real estate market. To ensure certainty of title on future foreclosures, and to allow the prompt return to the stream of commerce of property after foreclosure, lenders may need to foreclose all mortgages by action, which could flood the overburdened and underfunded judicial system with thousands of new cases each year.

As the real estate market continues to recover from an unprecedented foreclosure crisis, it is imperative that lingering title issues due to an over-arching strict compliance foreclosure standard should not prevent foreclosed properties from reentering the market. Foreclosures with technical defects should be invalidated only when a person with a protected interest in the property timely challenges the foreclosure and has been prejudiced by the defect.

CONCLUSION

The Amicus Parties respectfully request the Court to overrule the Court of Appeals' strict compliance holding that any defect in a foreclosure by advertisement voids the foreclosure and reaffirm this Court's longstanding precedent that a defect in a foreclosure by advertisement is voidable where the violated statute protects the interests of the party challenging the foreclosure and the defect prejudices the party challenging the foreclosure.

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STATE OF MINNESOTA
IN SUPREME COURT

A11-1081

1st Fidelity Loan Servicing, LLC,

Appellant,

vs.

Doris Ruiz,

Respondent,

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms with the requirements of Minn. R. Civ. App. 132.01, subds. 1 and 3, for a brief produced with a 13 pt. Times New Roman font. The length of the brief is 6,748 words. This brief was prepared using Microsoft Word 2007 software.

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